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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

STATE OF UTAH and JUAB COUNTY OF THE STATE OF UTAH, Plaintiff vs. UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Defendants.	**COMPLAINT TO QUIET TITLE** Case No.

Plaintiffs State of Utah ("State") and Juab County of the State of Utah ("Juab" or "the County") allege as follows:

INTRODUCTION

1. This is an action to quiet title to certain described rights-of-way for highways, including the scope thereof, under the grant of R.S. 2477, an 1866 enactment of Congress.

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1346(f) and 2409(a) (quiet title to real property in which the United States claims an interest).

3. Venue is proper under 28 U.S.C. § 1391(e) inasmuch as the lands in issue are located in Utah.

PARTIES

4. The State is one of fifty sovereign states forming the United States of America, having been admitted to the Union on January 4, 1896 on an equal footing with the original states. The executive power of the State is vested in the Governor, who is responsible for seeing that the laws of the State are faithfully executed. Utah Const. art. VII, § 5; Utah Code Ann. § 67-1-1.

5. Juab County is a political subdivision of the State of Utah responsible for providing local government services, including but not limited to road construction, reconstruction and maintenance, search and rescue, emergency medical services and law enforcement, all of which depend on access along the highways.

6. The State and Juab County are joint owners of the R.S. 2477 rights-of-way in Juab County. Utah Code Ann. § 72-5-302(2). An R.S. 2477 right-of-way is an interest in real property consisting of the dominant estate in the land.

7. Defendant United States of America is the federal government and the owner of the servient estate adjacent to the highways relevant to this action as further described below.

8. Defendant United States Department of the Interior ("DOI") is the department of the federal government to which Congress delegated specific authority to administer the public lands under federal law, and hence the above-referenced servient estate.

9. Defendant United States Bureau of Land Management ("BLM") is the agency within the DOI that has been delegated specific authority by Congress to administer public lands, and hence the above-referenced servient estate, under federal law.

BACKGROUND AND ALLEGATIONS REGARDING R.S. 2477 HIGHWAYS WITHIN THE STATE OF UTAH

10. R.S. 2477, enacted by Congress in 1866, provides in pertinent part as follows:

> § 8. And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Mining Act of July 26, 1866, § 8, 14 Stat. 251, 253, 43 U.S.C. § 932 (1970) (repealed with savings provisions).

11. An R.S. 2477 right-of-way is a valid existing property right – an easement recognized by law as the dominant estate in the land.

12. Though R.S. 2477 was repealed in 1976, the repealing legislation specifically recognized the continuing validity of R.S. 2477 rights-of-way established as of 1976. Federal Land Policy and Management Act ("FLPMA") §§ 509(a), 701(a) and 701(h), codified respectively at 43 U.S.C. §§ 1769(a) and 1701, savings provisions (a) and (h).

13. R.S. 2477 was self-executing; ratification or approval by the federal government was not required to perfect an R.S. 2477 right-of-way. Sierra Club v. Hodel, 848 F.2d 1068, 1083-84 (10th Cir. 1988).

14. As a matter of federal law, state law controls perfection and scope of an R.S. 2477 right-of-way. Id. at 1081-84.

15. Under Utah law an R.S. 2477 right-of-way could be established ("perfected") by public use for a period of ten years without formal action by any public authority, or by other affirmative action indicating an intent to accept the grant, including but not limited to construction or maintenance of a road.

16. The scope of an R.S. 2477 right-of-way is that which is reasonable and necessary for the type of use to which the right-of-way has been put. Hodel, 848 F.2d at 1083-1084 (affirming the District Court's "reasonable and necessary" definition).

17. Such areas along the roadway beyond the actual beaten path as are reasonable and necessary to accommodate "sound engineering practice," including lands on which attendant accouterments such as drainage ditches, culverts, shoulders and cut slopes existed as of October 21, 1976, or any applicable earlier reservation cut-off date, or reasonably and necessarily are added after that date to accommodate increased travel, are "part of the reasonable and necessary use" and are therefore within the scope of each highway right-of-way. Hodel, 848 F.2d. at 1083-84. The scope also includes such areas as are reasonable and necessary to accommodate service of such accouterments as are put in place pursuant to sound engineering practice.

18. The scope of an R.S. 2477 right-of-way includes the right to conduct reasonable and necessary maintenance within the right-of-way and to make reasonable and necessary improvements therein without BLM authorization. Id. at 1083, 1086 n.16. This necessary legal consequence is acknowledged in the 1990 DOI policy regarding R.S. 2477, which provides as follows: "The holder of the right-of-way has no requirement to inform the BLM of its activities on or within the right-of-way. As such, the Department has no authority under R.S. 2477 to review and/or approve such reasonable activities." BLM Instruction Memorandum No. 90-589. See also Department of the Interior's Report to Congress on R.S. 2477 (June 1993) (Appendix II, Exhibit M at 4) (stating that activities within the R.S. 2477 right-of-way that are within the jurisdiction of the right-of-way holder "include, but are not necessarily limited to, maintenance, reconstruction, upgrading, and reasonable activities").

19. The scope of an R.S. 2477 right-of-way is "'not . . . restricted to the actual beaten path,'" but includes the right to widen the road to meet the exigencies of increased travel even after 1976, "at least to the extent of a two-lane road" to allow travelers to pass each other. Hodel, 846 F. 2d at 1083.

20. Though R.S. 2477 was repealed on October 21, 1976 by the Federal Land Policy and Management Act (FLPMA), R.S. 2477 rights-of-way in existence on the date of FLPMA's passage are protected under that act.

21. FLPMA section 701(a) provides:

> Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way,

or other land use right or authorization existing on the date of approval of this act.

22. FLPMA section 701(h) provides:

> All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

23. FLPMA section 509(a) provides:

> Nothing in this title [43 U.S.C. §§1701-1784] shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted.

24. In 1939, DOI regulations provided:

> [R.S. 2477 (43 U.S.C. 932)] becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.

43 C.F.R. §244.55 (1939).

25. In 1963, BLM regulations provided:

> Grants of [R.S. 2477 rights-of-way] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses. No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

43 C.F.R. §244.58 (1963).

26. In 1974, BLM regulations provided:

> No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. . . . Grants of [R.S. 2477 rights-of-way] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses.

43 C.F.R. §§2822.1-1 & 2822.2-1 (1974).

27. BLM's current regulations state that if an attempt to administer rights conferred under a right-of-way grant issued prior to October 12, 1976 "diminishes or reduces any rights conferred by the grant or the statute under which it was issued, . . . the provisions of the grant or the then existing statute shall apply." 43 C.F.R. §2801.4.

28. The language of BLM's current regulations was explained by BLM as follows:

> [I]f questions should arise regarding the rights of a right-of-way grant holder under a grant or statute, the earlier editions of the Code of Federal Regulations on rights-of-way will remain available to assist in interpretation of the rights conferred by the grant or earlier statute . . . . In carrying out the Department's management responsibilities, the authorized officer will be careful to avoid any action that will diminish or reduce the rights conferred under a right-of-way grant issued prior to October 21, 1976.

51 Fed. Reg. 6542 (February 25, 1986).

29. BLM policy has required that a road be considered a public road when public funds have been spent on the road. BLM Manual, Rel 2-229, 2801.

30. BLM policy has stated that "[w]hen the history of a road is unknown or questionable, its existence in a condition suitable for public use is evidence that construction sufficient to cause a grant under R.S. 2477 has taken place." BLM Manual, Rel 2-229, June 30, 1986. See Sierra Club v. Hodel 675 F. Supp. 594, 605 (D. Utah 1987).

31. DOI and BLM have recognized that under law BLM need not authorize activities conducted within the scope of an R.S. 2477 right-of-way.

32. The Secretary of Interior has recognized that BLM has no adjudicative or decision-making role to play in determining the existence or scope of an R.S. 2477 right-of-way and that any conclusions drawn by the agency are for administrative convenience only, thus not appealable to the Interior Board of Land Appeals ("IBLA"), leaving actual decisions to the courts.

33. DOI and BLM have recognized the historic DOI regulation providing that validity of an R.S. 2477 right-of-way was not dependant on DOI or BLM recognition of that validity.

34. Sixty-nine percent of the land base in the State of Utah is owned by the federal government and large numbers of roads in Utah traverse lands owned by the federal government.

35. "Normal Maintenance Activities" as used in this complaint means routine maintenance involving use of road graders and other equipment to conduct activities including, but not limited to, the following:

a. Making minor vertical and horizontal alignment alterations as appropriate to provide or improve safety;
b. Grooming and grading of the previously constructed road surface;
c. Establishing and maintaining the crown with materials gathered along the road;
d. Filling ruts;
e. Spot filling with the same or improved materials;
f. Leveling or smoothing washboards;
g. Clearing the roadway of obstructing debris;
h. Cleaning culverts, including head basins and outlets;
I. Resurfacing with the same or improved materials of the same general type;
j. Maintaining, repairing, replacing and installing rip rap;
k. Maintaining drainage;
l. Maintaining and repairing washes and gullies;
m. Maintaining, repairing, replacing and installing culverts as necessary to protect the existing surface from erosion;
n. Repairing washouts;

o. Maintaining, repairing, replacing and installing marker posts;
p. Maintaining, repairing, replacing and installing water crossings;
q. Maintaining, repairing, replacing and installing cattle guards;
r. Maintaining, repairing, replacing and installing road signs.;
s. Repairing, stabilizing and improving cut and fill slopes;
t. Removing snow.

36. Performance of Normal Maintenance Activities on County roads minimizes degradation of the servient estate by decreasing erosion, fugitive dust and other impacts on adjacent lands.

37. BLM historically did not attempt to require the County to inform BLM, submit plans, or request approval or other authorization before conducting Normal Maintenance Activities on the roads subject to this suit.

38. BLM historically did not object to Normal Maintenance Activities on these roads.

39. Juab County has performed Normal Maintenance Activities on thousands of miles of roads for decades. These activities are generally conducted on an "as needed" basis, taking into account Juab County's financial resources available for that purpose.

GENERAL ALLEGATIONS REGARDING THIS QUIET TITLE ACTION

40. This is an action under 28 U.S.C. §2409a to quiet title to three R.S. 2477 rights-of-way in Juab County of the State of Utah. The rights-of-way are described herein and in Exhibits 3 through 8, incorporated herein.

41. The State and Juab County hold their R.S. 2477 right-of-way interests in the roads in issue without necessity of any approval of the federal government (Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988)). Those right-of-way interests under R.S. 2477 entitle the State

and Juab County "to make reasonable and necessary improvements within the boundaries of the right-of-way" (Id. at 1086 n.16), and "no BLM authorization is needed for construction to proceed." Sierra Club v. Hodel 675 F. Supp. 594, 605 n.31 (D. Utah 1987). Accordingly, the State and Juab County previously performed maintenance and construction activities on the roads in issue and in the ordinary course would continue to do so.

42. Notwithstanding the facts stated in paragraph 41 above, the BLM now takes the position that road construction activities that have not been authorized by the federal government constitute trespass regardless of whether the road is an R.S. 2477 right-of-way. See, e.g., Federal Brief in Southern Utah Wilderness Alliance, et al. v. Bureau of Land Management, et al., Tenth Circuit Court of Appeals, Case Nos. 04-4071 and 04-4073, at 21 (August 2004). Also, BLM has repeatedly presented to representatives of the State of Utah and the Utah Counties a document it proposes as a template for agreements between BLM on the one hand and the State and Counties on the other, stating as follows: "BLM's position is that until such time that the County's asserted R.S. 2477 right-of-way has been acknowledged by the Secretary or a federal court of competent jurisdiction, or BLM grants a Title V right-of-way to the County for such purposes, the County may not maintain and/or improve the right-of-way." BLM has in fact closed portions of the rights-of-way at issue to maintenance as well as vehicular travel. BLM has also issued trespass citations for county maintenance and improvements on these rights-of-way and other rights of way in the State. These circumstances present a case or controversy through federal abridgement of the Counties' rights pertaining to the rights-of-way and constitute a real and

immediate threat by the BLM to cite the State and Counties for trespass upon the State's or Counties' exercise of their R.S. 2477 rights.

43. The State of Utah, in its own behalf and in behalf of Juab County, filed with the Department of the Interior various documents, which, taken together, constitute a notification of intention to file suit under 28 U.S.C. § 2409a(m). These documents constitute Exhibits 1through 2, incorporated herein.

44. The documents identified in paragraph 43 as constituting the notification of intention to file suit were dated June 14, 2000, and February 4, 2005, and sent to the Secretary of the Department of the Interior by U.S. mail, and the requirement of 28 U.S.C. § 2409a(m) that 180 days pass between the notification and the bringing of an action is satisfied.

45. R.S. 2477 enacted by Congress in 1866, provides in pertinent part as follows:

> §8. And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

46. The descriptions of the roads in the exhibits hereto are the result of field verification and precise location by mapping-grade Global Positioning Satellite (GPS) technology and in some instances digitalization from digital ortho-photo quadrangles published by the United States along the entire length of the roads. Data obtained by GPS has been electronically downloaded to computers where they were checked for accuracy.

47. The age and use of all these roads is verified by aerial photography, government maps, testimony of witnesses who have used or observed use of the roads before 1966, or if the roads were created by so-called mechanical construction other than by repeated vehicular

passage before 1976, or some combination thereof, and in all cases by the testimony of witnesses.

48. All such roads were open to the public as of 1976, but portions of each of the roads at issue have since been closed by the BLM.

49. All such roads at the time of their perfection by use or construction were located on non-reserved public lands.

50. Road uses as of 1976 continued until the BLM closed the rights-of-way at issue, though specific means of use may have evolved as conditions have changed, including increased use by such travelers as tourists, land managers and experts.

51. The scope of each of these R.S. 2477 rights-of-way, as a matter of federal law, is governed by Utah law. That scope is that which is reasonable and necessary for the type of use to which the road has been put; it includes the beaten path plus reasonable and necessary accouterments such as drainage ditches, culverts, shoulders, back slopes, realignments that have been made in response to natural impacts on the road such as flooding and rock slides, minor deviations from the common way to avoid encroachments, obstacles or obstructions upon the road, and the right to enhance the road even after 1976 to meet the exigencies of increased travel for traditional uses, at least to the extent of improving the road to two lanes so passengers could pass each other.

52. Reasonable and necessary management activities on the road are also part of the scope of the R.S. 2477 right-of-way of each of the roads that is a subject of this complaint. As long as the R.S. 2477 owner stays within the right-of-way, as defined in the previous paragraph,

that owner may make reasonable and necessary improvements without any BLM authorization. Sierra Club v. Hodel, 848 F. 2d 1068, 1086 n.16 (10th Cir. 1988). As BLM stated in its 1993 Report to Congress: "Reasonable activities within the R.S. 2477 right-of-way are within the jurisdiction of the holder. These include, but are not necessarily limited to, maintenance, reconstruction, upgrading, and [other] reasonable activities. BLM's concern is whether such activities are confined within the boundaries of the right-of-way or whether such activities are so extreme that they will cause unnecessary degradation of the servient estate." Department of Interior's Report to Congress on R.S. 2477 (June 1993) (Appendix II, Exhibit M at 4). Reasonable and necessary management includes the right reasonably to go beyond the traveled way in order to perform the indicated activities.

53. All such roads at the time of their perfection, through use or construction or both or otherwise, were located on non-reserved public lands.

FIRST CAUSE OF ACTION

(TO QUIET TITLE IN GRANITE CANYON ROAD IN JUAB COUNTY)

54. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 53.

55. Granite Canyon Road is located on public lands, not reserved for public uses, as more particularly shown on the accompanying Exhibits 3 and 6, incorporated herein by this reference. Exhibit 3 reflects the location of the road as identified and plotted using GPS or digital technology. Granite Canyon Road links up with other roads in the County's road system.

56. Construction and maintenance of the road since at least as early as the 1950s was performed by bulldozers. As early as 1949 or 1950, Juab County road personnel took a county bulldozer up Granite Canyon Road into Granite Canyon to repair washed out areas of the road. In the 1960s and the early 1970s an individual used heavy machinery to maintain the road up to the head of Granite Canyon. Both before and after 1976 other individuals observed county road crews grading the lower portion of Granite Canyon Road. Further, numerous individuals used hand tools to perform maintenance on the road prior to 1976.

57. Granite Canyon Road was also established before October 21, 1976, by continuous public use for at least ten years prior thereto, beginning at least as early as the 1930s. In the 1930s numerous individuals traveled Granite Canyon Road in horse-drawn wagons while herding sheep. Other individuals indicate that they have used Granite Canyon Road for a variety of purposes since at least as early as the 1940s.

58. The purposes for use of this road include livestock operations, sightseeing, recreation, search and rescue, law enforcement, prospecting, oil and gas development, land management, and traveling in and through the area.

59. Travelers on the road from before 1966 and continuing thereafter included those who went by horseback, truck and automobile.

60. At the time of its first use and perfection, or construction and perfection, or both, Granite Canyon Road was located on non-reserved public lands.

61. Defendants have asserted their claim to the dominant estate constituting Plaintiffs'

R.S. 2477 right-of-way by closing a portion of the road and by their actions as described above in paragraphs 41 and 42.

SECOND CAUSE OF ACTION

(TO QUIET TITLE IN TOM'S CREEK ROAD IN JUAB COUNTY)

62. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 53.

63. Tom's Creek Road is located on public lands, not reserved for public uses, as more particularly shown on the accompanying Exhibits 4 and 7 and incorporated herein by this reference. Exhibit 4 reflects the location of the road as identified and plotted using GPS or digital technology. Tom's Creek Road links up with other roads in the County's road system.

64. Construction and maintenance of the road before 1976 was performed by hand labor in addition to bulldozers and mechanical road graders. Since at least as early as the 1930s numerous individuals maintained the road using picks and shovels to smooth rock ledges and repair washouts. Further, individuals personally observed county road crews grading the lower portion of Tom's Creek Road prior to 1976.

65. Tom's Creek Road was also established before October 21, 1976, by continuous public use for at least ten years prior thereto. Since at least as early as the 1920s, individuals have traveled the road by horseback and horse-drawn wagon. In more recent years, though still prior to 1966, individuals have traveled the road using trucks, tractors, and a 1942 fire truck.

66. The purposes for use of this road include homesteading, logging, mining, prospecting, recreation, camping, picnicking, hiking, hunting, fishing, livestock operations

(sheep and cattle), federal, state, and local government access, traveling in and through the area, and accessing facilities that divert, channel, improve, and maintain the streams, springs and irrigation structures in Tom's Creek Canyon.

67. At the time of its first use and perfection, or construction and perfection, or both, Tom's Creek Road was located on non-reserved public lands.

68. Defendants have asserted their claim to the dominant estate constituting Plaintiffs' R.S. 2477 right-of-way by closing a portion of the road and by their actions as described above in paragraphs 41 and 42.

THIRD CAUSE OF ACTION

(TO QUIET TITLE IN TROUT CREEK ROAD IN JUAB COUNTY)

69. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 53.

70. Trout Creek Road is located on public lands, not reserved for public uses, as more particularly shown on the accompanying Exhibits 5 and 8, incorporated herein by this reference. Exhibit 5 reflects the location of the road as identified and plotted using GPS or digital technology. The road links up with other roads in the County's road system.

71. Trout Creek Road was established by means of hand labor, bulldozers, and heavy equipment before 1976. In the 1940s an individual personally observed mining outfits using heavy equipment to maintain the upper portion of Trout Creek Road. Numerous individuals have performed hand maintenance on the road prior to 1976. Such hand maintenance included using picks and shovels for tasks such as smoothing rough spots, filling in low spots, and

clearing rocks, and debris from the roadway. Further, prior to 1976 an individual witnessed county road crews grading the lower portion of Trout Creek Road.

72. Trout Creek Road was also established before October 21, 1976, by continuous public use for at least ten years prior thereto. Since at least as early as the 1920s individuals have traveled Trout Creek Road for a variety of purposes.

73. Since at least as early as the 1920s uses of Trout Creek Road have included hunting, camping, fishing, recreation, logging, mining, prospecting, law enforcement, and traveling in and through the area. One individual recalls using the road to haul mine dumps from mines in Trout Creek Canyon to a tungsten mill located at the mouth of Granite Canyon.

74. Travelers on the road from before 1966 and continuing thereafter have included those who went by horseback, horse-drawn wagon, farm tractor, automobile, and truck.

75. At the time of its first use and perfection, or construction and perfection, or both, Trout Creek Road was located on non-reserved public lands.

76. Defendants have asserted their claim to the dominant estate constituting Plaintiffs' R.S. 2477 right-of-way by closing a portion of the road and by their actions as described above in paragraphs 41 and 42.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request relief and judgment against Defendants as follows:

1. Quiet title in and to each highway described above;

2. Include within the scope of each such highway: a) that which is reasonable and necessary for the type of use to which the right-of-way has been put, b) the right to conduct

ordinary maintenance activities within the right-of-way, including making improvements short of paving the road and making reasonable and necessary deviations from the common way without any federal authorization, c) the right to widen the road at least to the extent of a two-lane road to allow travelers to pass each other when increased travel renders that reasonable and necessary, and d) areas along the roadway beyond the actual beaten path that are reasonable and necessary to accommodate reasonable and necessary accouterments such as drainage ditches, shoulders, culverts and road signs that accord with sound engineering practices, including the requirements of the American Association of State Highway and Transportation Offices ("AASHTO"), and to provide reasonable and necessary servicing of such accouterments as are put in place pursuant to that sound engineering practice;

3. Award the Plaintiffs attorneys' fees and costs to the extent permitted by law; and

4. Grant Plaintiffs such further relief as may be appropriate.

DATED this _____ day of August, 2005.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General

_____
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CERTIFICATE OF SERVICE

I hereby certify that on August ____, 2005, I caused a copy of the attached COMPLAINT TO QUIET TITLE to be served via first-class, certified United States mail, postage pre-paid, on the following at their last known addresses:

United States of America
Alberto Gonzales, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

United States of America
Gale A. Norton, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20530-0001

Utah State Office Bureau of Land Management
Sally Wisely, Utah State Director
324 South State, 4th Floor
Salt Lake City, UT 84111

_____
Jaysen R. Oldroyd